19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1057

FREDERICK C. MERGNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JOHN H. BURNETT,
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Counsel for Petitioner.

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FREDERICK C. MERGNER,

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PETITION FOR WRIT OF CERTIORARI

Frederick C. Mergner, petitioner hereinafter called the defendant, prays that a writ of certiorari be issued to review the judgment entered February 19, 1945, in the United States Court of Appeals for the District of Columbia (R. 85).

Judgment Below

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Jurisdiction

The jurisdiction of the court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. Sec. 347), and under Rule 38 of the Revised Rules of the Supreme Court of the United States. The opinion of the United States Court of Appeals for the District of Columbia was filed February 19, 1945, and this petition was filed March 19, 1945. The opinion of the United States Court of Appeals for the District of Columbia is included in the record certified to this Court (R. 81).

Statement of Case

The Government's Evidence

The petitioner, hereinafter called the defendant, was indicted for murder in the first degree (R. 4-5). He was convicted of murder in the first degree and sentenced to be electrocuted (R. 6-9). The United States Court of Appeals for the District of Columbia affirmed the conviction (R. 85).

On October 25, 1943 about 8 p. m. three or four shots were heard in the vicinity of Fifth and A Streets, Northeast, in this District (R. 15). Shortly thereafter a man was seen on Seventh Street, Northeast. He and a woman were at the door of a parked automobile (conceded to be the defendant's). The door was open and the man was removing the woman from the car. He had her in his arms and placed her on the ground (R. 12). The woman was mumbling incoherently. The woman's head was bending back, her face was bleeding and appeared to be bruised. The man asked one Grace M. Lucas what she was looking at and drove away. The woman was on the sidewalk, lying partially in a tree box. A manhole cover was partially off of the manhole in the street (R. 13).

The body was that of Charlotte Robinson, the deceased named in the indictment (R. 11-12). After the man was seen to drive away, it was found that Mrs. Robinson was still alive and had on only one shoe. The other shoe could not be found at the scene (R. 13-14). It was then ascertained that the manhole cover was about half or two-thirds off and slid back on the street and that the body of Mrs. Robinson was fifteen to eighteen feet from the manhole (R. 14).

Mrs. Robinson was removed to Casualty Hospital. She was suffering from three bullet wounds on the left cheek, one on the left temple, and a fracture of the third finger of the left hand. All of these places had powder burns on them. Mrs. Robinson died at 9 p. m., October 25, 1943, as a result of the wounds in her head (R. 14-15).

Two bullets taken from the head of Mrs. Robinson were thought to have been fired through defendant's gun, as well as the bullet found in the defendant's automobile by Sergeant Crooke (R. 31).

Detective Sergeants Crooke and Perry went to the defendant's home, 3328 University Place, near American University, the following day, October 26, 1943, about 2 p. m. Opposite the residence was defendant's automobile. There was a bullet hole in the right ventilator window and a ladies' coat on the front seat of the car. The front seat had a flowered covering with blood stains on it. Sergeant Perry went to the house, met the defendant's father and was invited in. Upon entering, the defendant inquired if that were the police and the father answered "Yes." The defendant inquired of the two Sergeants if either of them were Inspector Barrett. They said "No" (R. 15).

After inquiry by Sergeant Perry defendant said that Charlotte Robinson had worked at that house, that he was in love with her, but that he never wanted to see her again, that she was a rat (R. 15).

When the police officers entered the above premises there was a wine bottle out of which defendant's father gave him a small drink. The defendant then got the bottle, but his father took it away from him (R. 16).

While Sergeant Crooke was talking to the defendant at the University Place address, defendant was noticeably under the influence of alcohol. The Sergeant could understand the defendant very plainly. There was no thickness of the defendant's tongue. Defendant was very nervous; on one or two occasions he cried and gritted his teeth. Defendant did not make any particular remarks when crying; he would make a face or grimace (R. 17).

Sergeant Perry testified that defendant, at the time of his arrest, got abusive, loud and boisterous; he would curse and swear, tell the Sergeant that defendant could whip him, that defendant had never been whipped in his life and if the Sergeant did not think that the defendant could whip him, the Sergeant could feel defendant's arm and see how hard it was. Defendant volunteered these remarks (R. 19). Sergeant Perry further stated that defendant would start cursing off and on, "would have spells of cursing and then would talk naturally, fairly normal." Perry could not say what brought on the cursing spells, but it seemed that most of the cursing occurred when the deceased's name was mentioned. The defendant seemed hostile to the deceased and cursed both of the police Sergeants (R. 20).

The defendant was placed under arrest and asked where the gun was. Defendant said that it was in the car. Sergeant Perry stepped out of the room and Sergeant Crooke was asked to sit down. As the latter sat down, the defendant got up from his chair and pulled a gun from his hip pocket. The Sergeant jumped on defendant's back, the rug slipped and defendant went down on his face. The defendant stated that he was going to kill one of the police officers and the gun was then taken from him (R. 16).

Sergeant Crooke did not pay a lot of attention to the threat of defendant because he "thought defendant was talking" (R. 17).

After the gun was taken from the defendant, the Detective Sergeants raised the defendant and sat him in a chair. It was not known whether the defendant could have gotten up by himself (R. 17). After the defendant was seated in the chair he was "staring off in a staring manner" (R. 18).

While in the University Place house when defendant was standing still he "had a little weave" from liquor (R. 18).

The defendant was taken in the police car which started for No. 8 Police Precinct. En route a radio call ordered the defendant taken to No. 10 (R. 16).

On the way to No. 10 Precinct, Sergeant Perry talked to the defendant and "apparently, defendant understood." At that time defendant insisted that Perry get him some whiskey, but the latter "stalled defendant off," told him he could not guarantee that he could and did not know whether they would pass any liquor stores. The defendant stated that he would tell "all about it" if Perry would get him some liquor (R. 19).

It was noticed that defendant staggered real bad climbing the steps at No. 10 Precinct. When the defendant talked to Sergeant Crooke, the latter understood defendant very well and defendant seemed to understand what was said to him (R. 16).

Upon arrival at No. 10, defendant was turned over to Inspector Barrett and Lt. Flaherty of the Police Department (R. 16).

The police sergeants returned to the University Place address and found in the automobile a ladies' coat, a ladies' slipper, an umbrella and a ladies' pocketbook. A bullet was

taken from the top of the car. A man's pair of shoes and a man's coat were taken from the house (R. 17).

Some of the articles taken from the automobile had the same type of blood on them as that of the deceased. The blue shoe found in the automobile was the mate of the one deceased wore the night of the shooting (R. 32).

Miss Verna Harrison, a friend of the deceased, testified as to the conduct of defendant and deceased prior to the shooting and stated that she saw the defendant on Sunday, the day before the shooting (R. 33). At that time the defendant came to the room where that witness and deceased had been living and left a $100.00 bond which deceased had purchased from one of the defendant's daughters and a check for $20.00 for salary due the deceased from the defendant (R. 34).

Testimony Out of Presence of the Jury

Robert J. Barrett, Inspector of Police, talked to the defendant on October 26, 1943, about 3 p. m. at No. 10 Precinct. Before that conversation was adduced, the jury was excluded and the testimony of the Inspector was taken out of their presence. The Inspector stated that the defendant was not taken before the United States Commissioner until 4:15 p. m. (R. 20), and that defendant's condition was the same then as it was at No. 10 (R. 22).

Defendant had known Inspector Barrett for a long time. Their children were friends and played together (R. 21, 25).

Barrett testified that the defendant was being taken to No. 8 Precinct but that witness ordered the defendant to No. 10 "for the purpose of witness seeing defendant and talking to him" (R. 20). At No. 10, defendant was under the influence of intoxicants. Defendant cried and "had to hold" Barrett's coat and hand. Defendant cried while he was talking; he was not hysterical, but defendant had Bar-

rett's arm, pulled his coat and squeezed his hand. The defendant talked very plain at times and at other times a little different. Defendant would start to tell Barrett about what he had done, then he would break off, start talking about the children and start crying. The defendant, at that time, stated that he had been drinking since Friday. (The conversation occurred on Tuesday.) Defendant "looked the part, he looked like a man that had been on a drinking spree for a few days"; his eyes were bloodshot, his face was red; the odor of alcohol was on his breath and "he gave every indication of a man who had been drinking a couple of days" (R. 21).

"The reason witness (Barrett) sent defendant to No. 10 was because witness could talk to him there" (R. 21).

It was conceded that Inspector Barrett offered no inducement to the defendant to make a statement at No. 10 Precinct. At that time, however, the defendant had no attorney (R. 22).

Lt. Flaherty of the Police Force stated that the defendant was not drunk at No. 10 Precinct when he and Inspector Barrett talked to the defendant but that you could tell he had been drinking from his appearance and "his conversation." On that occasion defendant would cry at times, "and that other times he would grab witness and show how strong he was." Defendant "would jump from one object to another" (R. 22).

The inconsistency of the testimony of the police officers respecting the drunkenness of the defendant is best demonstrated by Lieutenant Flaherty, who had the temerity to testify that he "would not say defendant was drunk" yet in the next breath he said: "In fact, if defendant was walking down the street *and witness did not come in contact with him,* witness would not arrest him" (R. 22).

The only conclusion that can be drawn from that last statement of Flaherty is, that if Flaherty *had come in con-*

tact with the defendant on the street, Flaherty would have arrested him for being drunk.

Needham C. Turnage, called by the defendant, stated that he was United States Commissioner for the District Court of the District of Columbia. Between 4 and 5 p. m. on October 26, 1943, a complaint was issued against the defendant and a plea of not guilty was entered by Mr. Turnage because

> the defendant was so emotionally disturbed that he ought not to have been arraigned. Defendant was apparently in a condition where he had very little understanding of the gravity of the charge which had been placed against him. Defendant was not in any position to be arraigned at that time. Defendant seemed to have no understanding whatever of the predicament he was in. Defendant answered to his name, he made something of a scene, which I would call a scene, not too terrible of a scene, and acted certainly abnormally, to say the least. Defendant was talking, his conversation was absolutely unintelligible (R. 23).

The defendant "was never arraigned" (R. 24).

Objection to Confessions

After the testimony of the police officers Barrett and Flaherty and that of Commissioner Turnage was heard as above, the defendant objected to the admission of the statements made to Inspector Barrett and Lt. Flaherty on the ground that defendant was taken to No. 10 Precinct for the purpose of having the police talk to him when he should have been arraigned, the defendant was intoxicated or under the influence of liquor and had no attorney. That objection was overruled and exception noted. The jury was recalled and the testimony resumed (R. 24).

Substance of the Confessions

The statements which the defendant made to the police and which were admitted in evidence are found in the

testimony of Inspector Barrett and Lt. Flaherty (R. 24-31). The testimony of the officers respecting the physical and mental condition of the defendant is substantially the same as that given out of the presence of the jury.

At No. 10 Precinct the defendant stated that he had given himself up, but Inspector Barrett explained to the defendant that he had not given himself up and that Officers Perry and Crooke had arrested him (R. 24).

The defendant stated that he had known Mrs. Robinson since April 5, 1942; that she was sick and he had taken care of her; that around Christmas time a friend of the deceased had visited her and defendant thereafter noticed a change in Mrs. Robinson; that Mrs. Robinson was not a citizen of the United States when she came to work for the defendant, but she later endeavored to become naturalized. From the correspondence of the deceased, the defendant learned that she had a criminal background and that her husband was in trouble (R. 24).

The defendant also stated that Mrs. Robinson was after him for money and that on the night of the killing defendant's daughter had called the deceased and talked to her. The defendant then talked to deceased over the phone and the latter wanted $4,000.00 and asked that some of her clothes be brought to her. The defendant met Mrs. Robinson at Fourth and East Capitol Streets. They drove to Fourth and A Streets and en route the deceased kept asking where the money was. The defendant told her it was in a bag in the back seat and she looked there and in the glove compartment of the car and did not see it. There was "quite some argument" and at Fourth and A Streets the defendant shot Mrs. Robinson several times. The defendant then stated that he drove to Seventh and A Street where he was going to put Mrs. Robinson down the sewer but a lady came along and he left Mrs. Robinson there. The

defendant stated that Mrs. Robinson was a rat and that he wanted to put her down there with the rats (R. 25).

The defendant never explained what the argument was between himself and Mrs. Robinson that resulted in the shooting; the defendant did not know how many shots he fired (R. 28-29).

The defendant was in love with the deceased, thought she was in love with him and they talked of marriage. Shortly after getting her citizenship papers, Mrs. Robinson got a job. The defendant stated that he tried to get her to come back; that he called her several times but could not get her on the phone (R. 28).

The defendant stated that he saw his car in front of his house which had a bullet hole in it, blood on it and that he saw a slipper therein; that Mrs. Robinson's pocketbook was on the front seat of the car and he took it and put it in a bureau drawer in his bedroom (R. 26).

The defendant was booked at headquarters at 4:15 p. m. following the statement and immediately taken to the United States Commissioner (R. 26).

The officers talked to the defendant on October 28 at the District Jail. The defendant at that time was told that there were a few things the officers wanted to straighten out. The defendant said he wanted to correct his statement about the shooting at Fourth and A, that it happened on Fifth between A and East Capitol. Defendant said that he was not in the habit of carrying a gun, that he kept the gun in his dresser drawer at home and had it in his pocket that night. When told by the officers that his statement about putting the deceased in the sewer for the rats was more or less vicious, the defendant said "she is a rat, she is rotten, she is rotten inside" (R. 25). The defendant stated that he would rather not answer other questions until he talked to his attorney. The defendant's condition at the Jail was

noticeable, there was a big difference from his condition at the precinct. At the Jail the defendant was not under intoxicants and looked like a perfectly sober man (R. 27).

The Defense Evidence

Evidence was produced by the defendant showing that the defendant was intoxicated as early as October 21, preceding the shooting on October 25, 1943 (R. 35). On Friday, the 22nd, the defendant "was stinking drunk" (R. 55). "He was very drunk Saturday night and Sunday" (R. 38). On the Sunday preceding the shooting the "defendant was quite intoxicated about five p. m." He talked at random, rather foolishly, and was unsteady on his feet (R. 35-36). The defendant was sent home from work on Sunday and ordered not to come back to work until his condition was better (R. 41, 40). On Monday morning the defendant was drunk, "he could not speak straight, he mumbled, and the smell of liquor was enough to knock you down" (R. 55). The defendant called his employer Monday and the former said at that time, that he was in no shape to return to work (R. 41).

The defendant was drunk Monday night (R. 38-36-35), both before and after the shooting (R. 38). On Monday night after the shooting the defendant could not talk right and a person "could not get any sense out of defendant" (R. 36). On Tuesday about one p. m. the defendant was "very much under the influence of liquor" (R. 36).

When taken before the United States Commissioner about 4:15 p. m. on Tuesday, October 26 (R. 26), the defendant's talk was intelligible at times and unintelligible at others, he was "sort of mumbling." The "defendant's condition was such that witness (United States Commissioner Turn-Turnage) ought not to have permitted defendant to enter a plea in any type of case." Defendant did not plead guilty

or not guilty before the Commissioner, but the Commissioner entered a plea for the defendant (R. 39).

After appearing before the United States Commissioner, the defendant was placed in custody of Mr. Kearney, Chief Deputy, United States Marshal. This was about 5:30 p. m. on Tuesday. Mr. Kearney testified that the defendant was drunk. The defendant said that he had drunk at least a gallon of both wine and whiskey. The defendant was fingerprinted but his signature could not be obtained because the defendant could not write (R. 37). The defendant thought that he had his Packard car with him and told Mr. Kearney to take it and get some whiskey.

Dr. Murphy, a Deputy Coroner for this District, testified that he saw the defendant between 5:20 and 5:30 p. m. on Tuesday, October 26, in a cell at the Court House in the presence of Drs. McDonald and Rosenberg (Coroner and Deputy Coroner, respectively). The purpose of Dr. Murphy's visit was to make tests to determine whether the defendant had any blood on him. Defendant's speech was coherent at times and incoherent at other times and more or less rambling in character. Dr. Murphy knew that the defendant had been indulging in alcoholic beverages (R. 39), but not to the extent of complete intoxication. No test was made then because the doctor "did not think defendant qualified to give permission for said test." The defendant attempted to write his name but the signature was very rambling. It could be read, but it was the type of a nervous individual, it was all run together and the letters were very irregular (R. 40).

Mr. Sard testified that he was Chief Clerk of the D. C. Jail and he saw the defendant on Tuesday, October 26, 1943, about 6 p.m. The defendant appeared to be in somewhat of a haze, he was orderly and quiet and was placed

in the "control cell, a cell used for the control of inmates." (R. 41).

Defendant's Testimony

The defendant told of meeting the deceased and of his actions and drinking preceding the time he met Mrs. Robinson on the night of the killing (R. 41-47). He testified that he met Mrs. Robinson at Fifth and A Streets, S.E., and started drinking; that he and Mrs. Robinson were drinking and that "it was a blackout." He didn't remember a thing. "He did not remember going home or anything." (R. 47). The defendant then narrated the details of what occurred the morning after the shooting. (R. 48-49).

The defendant stated that he did not know whether or not he killed Mrs. Robinson; that he did not know whether he had the revolver when he went to meet the deceased and that he did not see it at that time (R. 49). The defendant testified at length on cross-examination (R. 49-54) but he did not say anything respecting the actual shooting other than state the fact that he did not remember what occurred. The defendant did say that the story that he had told at No. 10 precinct was what he read in the newspapers; that his car had blood in it and everything was disarranged. The defendant remembered going over to have a date with Mrs. Robinson that night and all those facts caused him to call Inspector Barrett.(R. 52).

Expert Testimony

Dr. Antoine Schneider, in answer to a hypothetical question based on the facts theretofore proved by the prosecution and defense, stated that in his opinion the defendant was of unsound mind on the evening of the shooting (R. 56-57). Dr. Edgar D. Griffin, for the Government, disputed such testimony (R. 58-64).

Motions of Defendant

After the foregoing testimony was introduced the defendant moved the Court to strike the statement of the defendant to Inspector Barrett and Lt. Flaherty at No. 10 Precinct on the ground that the statement was involuntary and that the defendant had no counsel, that he was under the influence of liquor, was taken to No. 10 Precinct for the purpose of getting a statement from him before he was arraigned and that no attempt to arraign the defendant was made until some hour and fifteen minutes after the statement was made (R. 54-65).

The defendant also moved the Court to direct the jury that they could not convict the defendant of murder in the first degree, on the ground of insufficiency of evidence, relative to intent, premeditation and deliberation (R. 65).

The Court overruled these motions, the case was argued and the Court instructed the jury (R. 65-78), leaving the question of degree of murder (R. 67-71) (R. 73-74) and the admissibility of defendant's confessions (R. 75) to the jury to determine as matters of fact.

Question Presented

In a homicide case, where it appears that the defendant was illegally detained, that he was intoxicated to the point of stupefaction and that he was unable to consult counsel,—is a confession obtained under such combination of factors admissible in evidence against the defendant?

Reasons for Granting the Petition

The petitioner, in the trial court and in the appellate court relied upon a *combination* of proved circumstances which made his confession inadmissible.

First, the evidence disclosed that the petitioner had no counsel at the time of his arrest and at the time of his con-

fession. He relied upon *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019 and *Walker* v. *Johnston*, 312 U. S. 275, 85 L. ed. 830, 61 S. Ct. 574.

Secondly, the evidence disclosed that at the time the confession was obtained from petitioner, he was hopelessly intoxicated, to the point of stupefaction.

Third, the petitioner was, for a short time, illegally detained by the arresting officers but for the *express purpose* of obtaining a confession. Petitioner relied on *McNabb* v. *United States*, 318 U. S. 332, 87 L. ed. 819, 63 S. Ct. 608, and *United States* v. *Mitchell*, 322 U. S. 65, 88 L. ed. 812, 64 S. Ct. 896.

The appellate court held the *McNabb* Case, Supra, to be inapplicable and pitched its decision *solely* on the ground that intoxication of a defendant, was insufficient to exclude a confession.

The law as announced by this Court in the *McNabb* and *Mitchell* Cases, Supra, was not followed.

That this case is of importance is demonstrated by the fact that, in and by the judgment complained of and to be brought under review, human life has been declared as forfeit. That its correct decision is of great and wide-spread public interest and essential to the certain and general administration of justice in the courts of the United States is sufficiently and plainly apparent from the statement made and the failure on the part of the final appellate tribunal, sitting in the District of Columbia, to accept as binding authority the opposite pronouncement of this the tribunal of final appeal in matters of Federal cognizance, sitting in all these United States.

Again, in the interest of uniformity and clarity of decision in matters of such prime importance as the admission of evidence tending to conviction in capital cases in courts

of the United States, it is respectfully submitted that this petition for certiorari should be granted.

Conclusion

WHEREFORE, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to The United States Court of Appeals for the District of Columbia, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in case numbered 8806 on its docket "*Frederick C. Mergner* v. *United States*," and that the said judgment of the Court of Appeals, for the District of Columbia, may be reversed and for such other and further relief as to the court may seem meet and proper.

FREDERICK C. MERGNER,

Petitioner,

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SUPREME COURT OF THE UNITED STATES

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FREDERICK C. MERGNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinion

The opinion of the United States Court of Appeals for the District of Columbia was filed February 19, 1945, and appears at page 81 of the Record.

Jurisdiction

The statement of the grounds on which the jurisdiction of this court is invoked is contained in the Petition for Writ of Certiorari, supra, (page 2).

Statement of the Case

The statement of the case is contained in the Petition for Writ of Certiorari, supra, (page 2).

Specification of Errors

The petitioner urges the following assigned errors:

1. The Court erred in admitting the statements and confessions of the defendant.

2. The Court erred in refusing to strike from the evidence the statements and confessions of the defendant.

3. The Court erred in denying the motion of defendant to direct the jury that it could not return a verdict of murder in the first degree (R. 9).

ARGUMENT

For the purposes of this petition the petitioner relies upon the errors of (1) admitting the defendant's confession and (2) refusal of the Court to strike the confession from the evidence.

However, without the confessions, there would have been a lack of sufficient evidence of premeditation and deliberation to make a case of first degree murder. *Bullock* v. *United States*, 74 App. D. C. 220, 122 F. 2d 213; *Bostic* v. *United States*, 68 App. D. C. 167, 169, 94 F. 2d 636, 638.

There were two statements made by the petitioner, but the petitioner has maintained and still maintains that the first statement of the defendant was so interwoven in the second statement as to be a part and parcel of it; and that, if the first was inadmissible, the second which necessarily flowed from it was also inadmissible.

In its opinion, the appellate court relied upon the confessions of the defendant to make a case of deliberate and premeditated murder (R. 82-83).

In the trial court and in the appellate court, petitioner did not rely upon the *single* factor of drunkenness of the defendant for exclusion of the confession (R. 65). As then, we now rely upon the *combination* of *three* factors for ex-

clusion of the confession, namely (1) the illegal detention of the defendant, (2) his inability to consult counsel and (3) his drunkenness.

Illegal Detention of the Defendant

Sec. 4-140, D. C. Code, 1940, is as follows:

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

The United States Court of Appeals of the District of Columbia has held that section applicable to cases where prisoners are arrested for a felony by the Metropolitan Police Force of the District of Columbia. *Mitchell* v. *United States*, 78 U. S. App. D. C. 171, 138 F. 2d 426. True, that case was reversed, but on other grounds. *United States* v. *Mitchell*, 322 U. S. 65, 88 L. ed. 812, 64 S. Ct. 896.

Therefore, the law of the District of Columbia upon that proposition has been settled and determined and we must follow that law. *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 78, 82 L. ed. 1188, 58 S. Ct. 817.

In the case at bar, the defendant's arraignment was purposely delayed by the arresting officer, so that they could obtain a statement from the defendant.

Inspector Barrett, the Chief of the arresting officers, testified that he "ordered the defendant to No. 10 Precinct for the purpose of seeing defendant and talking to him" (R. 20) and "the reason witness (Barrett) sent defendant to No. 10 was because witness could talk to him there" (R. 21).

It must be conceded that the length of time of the detention of a prisoner without arraignment, standing alone, is no reason for exclusion of his confession. But, if the arresting officers deliberately flout the statute and defy the courts' interpretation of it for the avowed purpose of depriving a defendant of their efficacy and protection, whether the prisoner's detention be of long or short duration, then the case of *McNabb* v. *United States* is of no avail whatsoever. That opinion may well never have been written.

As stated in the *McNabb* case, 318 U. S. 345 (and reasserted in the *Mitchell* case):

> * * * Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

If this conviction is allowed to stand, then the statute and the opinions of the courts thereon are robbed of their intent, their effect and their consequences. The shield which they heretofore provided will have become the sheerest veil, which can be snatched from about the defendant with the slightest effort on the part of over-zealous police officers.

Inability to Consult Counsel

It is conceded that the defendant was unable to consult counsel (R. 22). Again, that alone is insufficient for the exclusion of a defendant's confession. But, when a defendant has been illegally detained, is without counsel and is in a mental state bordering on mania (if not actually in a state of mania), then, if ever, he should be afforded the advice and good offices of competent counsel. *Powell*

v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55; *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019; *Walker* v. *Johnston*, 312 U. S. 275, 85 L. ed. 830, 61 S. Ct. 574.

The Drunkenness of the Defendant

In the appellate tribunal, we urged that the drunkenness of petitioner was such that it precluded the possibility of premeditation and deliberation required for conviction of murder in the first degree. We also contended and still contend that petitioner was in such a drunken state as to be mentally incapable of knowing what he was doing or of appreciating the effect of his first statement to the arresting officers; and that under such circumstances, the arresting officers should not have been permitted to keep the petitioner away from the Committing Magistrate, who found petitioner mentally incapable (R. 23, 24, 38, 39), and who would have protected the defendant from the inquisition of the officers.

The time schedule of the events surrounding the first statement is considered important. It is as follows:

2 p. m.—Defendant arrested by Sergeants Crooks and Perry at 3328 University Place, N. W., near American University.

Defendant on way to No. 8 Precinct, on Albemarle Street, near Wisconsin Avenue, N. W., when ordered by radio to No. 10 Precinct by Inspector Barrett for the purpose of talking to defendant.

3 p. m.—At No. 10 Precinct on Park Road, N. W., near 7th Street, Inspector Barrett talked to defendant, then he and Lieutenant Flaherty talked to defendant.

4:15 p. m.—Defendant booked at Police Headquarters, 3rd and Indiana Avenue, N. W., and taken before United States Commissioner Turnage, at 7th and E Streets, N. W.

4-5 p. m.—Defendant before the Commissioner. Remanded to custody of Marshal.

5:20-5:30 p. m.—Defendant seen at cell room, District Court, by Drs. McDonald, Rosenberg and Murphy, and by Mr. Kearney.

6. p. m.—Defendant seen by Mr. Sard at District Jail, 19th and B Streets, S. E.

The defendant was arrested at 2 p. m. on Tuesday, October 26, 1943. He had been drinking continuously since Thursday, October 21, 1943. That evidence was uncontradicted.

The opinions of the defense witnesses made out a stronger case of intoxication of the defendant than did the witnesses of the prosecution. However, the facts stated by the police officers did not bear out their conclusions.

The first officers to see the defendant after the commission of the offense were Sergeants Crooke and Perry. This was about 2 p. m. the day following the slaying. Sergeant Crooke tried to convey the impression that defendant was mentally alert. However, he stated the fact to be that the defendant was noticeably under the influence of intoxicants; that he was very nervous; that defendant cried and gritted his teeth; that the defendant would make a face and grimace. Sergeant Perry was not as positive as Sergeant Crooke in his conclusion as to the mental alertless of the defendant. The former stated that "*apparently*, defendant understood" (R. 18). Evidently, that sergeant could not bring his mind to the positive conclusion which his brother officers entertained. Sergeant Perry noticed that the defendant was loud and boisterous, would curse and swear, boast of his strength and of his ability to thrash the sergeant (R. 19). Furthermore, this witness also stated that the defendant "would have spells of cursing and *then would talk naturally, fairly normal*" (R. 20). Undoubtedly, it was apparent to Sergeant Perry that there were times when the defendant was not mentally normal. The fairest conclusion to be deduced from the last statement of Ser-

geant Perry is that the conversation of the defendant, during the period that witness talked to him, was only *qualifiedly* normal.

The threats of the defendant against the police officers were not taken seriously. Sergeant Crooke "thought defendant was talking" (R. 17). That could only mean that the sergeant thought that the words of defendant were the ramblings of a mind befogged by liquor.

The defendant was said to have "weaved" from liquor (R. 18) and to have staggered real bad at No. 10 Precinct (R. 16).

Inspector Barrett and Lieut. Flaherty started to talk to the defendant at 3 p. m. at No. 10 Precinct. That conversation could not have lasted over an hour, because the defendant was booked at Police Headquarters at 4:15 p. m. and taken immediately before the United States Commissioner (R. 26).

It must be conceded that up until that time the defendant did not have counsel (R. 23). It cannot be denied that defendant was then under the influence of liquor. The prosecution can only dispute the degree of intoxication of the defendant.

The defendant knew Inspector Barrett (R. 20, 21, 25), yet when Sergeants Crooke and Perry appeared to arrest him, the defendant asked if either of them were Barrett (R. 15). When brought before Barrett at No. 10 Precinct, the defendant stated that he had given himself up, but the Inspector had to explain to him that he had not done so but that Officers Crooke and Perry had arrested the defendant (R. 24).

Before Inspector Barrett was permitted to narrate the statement of the defendant which was given at No. 10 Precinct, the jury was excluded and the question of the voluntariness of the statement was passed upon by the Court (R. 21-24). The Inspector, Lieut. Flaherty and United

States Commissioner Turnage were heard out of the presence of the jury.

Inspector Barrett stated that *he* had the defendant brought to No. 10 Precinct "because witness could talk to him there" (R. 21). At that time, according to Barrett, the defendant was under the influence of intoxicants, he cried, and "*had* to hold" Barrett's coat and hand. The defendant held Barrett's arm, pulled his coat and squeezed his hand. "Defendant talked very plain at times, at other times he was a little different * * *." The defendant would start to talk about what he had done and then would start to talk about his children. Defendant's eyes were bloodshot, his face red, the odor of alcohol came from his breath and the defendant gave every indication of a man who had been drinking a couple of days (R. 21).

It is true that Inspector Barrett testified that the defendant's statements were coherent and that he could understand the defendant, but the Inspector was not as positive about the mental state of the defendant. As to that, Barrett said that the defendant "*seemed* to understand what witness and Lieut. Flaherty said to him" (R. 21).

Here, it is well to take up Commissioner Turnage's testimony, because Inspector Barrett testified that at 4:15 p. m. he saw the defendant when the latter was on his way to the Commissioner's and that the "condition of the defendant was the *same as it was at No. 10*" (R. 22).

If that be true, then the powers of observation of the Inspector and the Commissioner, must be at opposite poles. The Commissioner, who is not a prosecuting officer, testified that

> the defendant was so emotionally disturbed that he ought not to have been arraigned. Defendant was apparently in a condition where he had very little understanding of the gravity of the charge which had been placed against him. Defendant was not in any posi-

tion to be arraigned at that time. Defendant seemed to have no understanding whatever of the predicament he was in. Defendant answered to his name, he made something of a scene, which I would call a scene, not too terrible a scene, and acted certainly abnormally, to say the least. Defendant was talking, his conversation was absolutely unintelligible. Witness could not remember what defendant said. Defendant was talking in a loud voice and also mumbling to himself. Witness could understand some of it but could not remember it. Defendant answered his name, said, "This is getting serious," then started to go all to pieces; he was pretty nervous (R. 23).

The Commissioner further testified that the defendant was never arraigned, but that when the defendant stood mute before him, a formal plea of not guilty was entered for the defendant (R. 24).

If the statement of Inspector Barrett be true, that the condition of the defendant when taken before the Commissioner was the same as it was at No. 10 Precinct, then the conclusions of the police officers as to that condition are of no weight whatsoever, because their *statements of fact*, together with the testimony of Commissioner Turnage clearly disclose that the defendant's intoxication was such that the defendant did not have sufficient mental capacity to know what he was saying when he made the statement at No. 10.

The inconsistency of the testimony of the police officers respecting the drunkenness of the defendant is best demonstrated by Lieutenant Flaherty, who had the temerity to testify that he "would not say defendant was drunk" yet in the next breath he said: "In fact, if defendant was walking down the street *and witness did not come in contact with him*, witness would not arrest him" (R. 22).

The only conclusion that can be drawn from that last statement of Flaherty is, that if Flaherty *had come in con-*

tact with the defendant on the street, Flaherty would have arrested him for being drunk. This witness also stated that the defendant "would jump from one object to another" (R. 22).

The police officers were too over-zealous in their efforts to obtain a conviction in this case and their testimony concerning the mental condition of the defendant at the time he made his statement at No. 10 Precinct should be given no weight whatsoever.

The trial Court permitted the statement of the defendant at No. 10 to be given to the jury notwithstanding the objection of the defendant that defendant was taken to No. 10 Precinct for the very purpose of obtaining a statement from him, although he should have been arraigned, although he was intoxicated or under the influence of liquor and without an attorney (R. 24). The admissibility of that statement was submitted to the jury as a question of fact (R. 75). That was reversible error.

At the conclusion of the evidence, defendant moved the Court to strike the statement of the defendant as given at No. 10, on the same grounds previously urged. At that time, the trial Court had before it the further testimony of Messrs. Kearney and Sard, Dr. Murphy and the acquaintances, business associates and relatives of the defendant.

After the defendant appeared before the Commissioner at 4:15 p. m., he was committed to the custody of the United States Marshal. Chief Deputy Marshal Kearney saw the defendant about 5:30 p. m. that evening. At that time Doctors MacDonald, Murphy and Rosenberg, of the Corner's Office, were present. Dr. MacDonald asked the defendant whether the defendant knew him. Defendant did not answer. "*After two or three minutes,* defendant said, 'You are Dr. Magruder.'" The defendant, when prompted, then got the name of Dr. MacDonald backwards, calling him MacDonald Magruder. The defendant was drunk, according to

Mr. Kearney. The defendant thought that he had his Packard car with him and told Mr. Kearney to take it and get some whiskey. The defendant was so drunk that he could not sign his name (R. 37).

Dr. Murphy placed the time of that conversation at between 5:20 and 5:30 p. m. He stated that defendant recognized him and after some hesitation got the name of Dr. MacDonald straight. The purpose of Dr. Murphy's visit was to make tests to determine whether the defendant had any blood on him, but the

> Defendant's speech was coherent at times and incoherent at other times and more or less rambling in character. Defendant would drift off into 'What will I do about my children?' Defendant had a distinct odor of alcohol on his breath. * * * Witness felt or knew that defendant had been indulging in alcoholic beverages to some extent (R. 39) but not to what witness would call complete intoxication. Witness saw no reason for going on with the test then, because of the fact that witness DID NOT THINK DEFENDANT QUALIFIED TO GIVE PERMISSION FOR SAID TESTS; * * * (R. 40).

Dr. Murphy also stated that defendant attempted to write his name but that it was all run together and very irregular.

If the defendant had been taken immediately before the United States Commissioner, if he had been examined by the Deputy Coroner and had been seen by the Chief Deputy United States Marshal, before the arresting officers talked to him, we are of the firm conviction that the police officers would not have had the brazenness even to endeavor to obtain a confession from the defendant.

If the events following the confession had occurred in the inverse order the trial court undoubtedly would never have admitted the confession.

We submit that the facts of this case disclose that the defendant was suffering from temporary insanity at the time he made his confession. But, if not, then his mind

was at least in such a state of confusion as to definitely preclude the arresting officers from slyly evading the dictates of statute and of the opinions of this Court.

It is not a departure from our established rules of evidence to hold that temporary insanity, is sufficient to make a confession made during the existence of such state inadmissible against a defendant, as a matter of law. That may be a step forward in the declaration of what the law really means, but it certainly cannot be said to be an innovation.

To so hold would not change the law respecting the responsibility for a crime. No court of any dignity has ever weighed the effect of the exclusion of a confession, wrongfully obtained, against the responsibility of the defendant for having committed the crime. To the contrary, the courts have consistently taken the position that a confession, wrongfully obtained, is inadmissible no matter what the consequence to the prosecution.

Of course, in using the phrase "wrongfully obtained," counsel does not intend to limit that phrase to cases where force, fraud or duress was used, or where some statute protecting the rights of the accused has been violated in the obtaining of the confession. For, it is equally true that a statement by a defendant is "wrongfully obtained" if obtained when the defendant is in such state of mind as to be mentally incapable of knowing what he was doing at the time of making the confession.

If that be the case, then the confession of this defendant was "wrongfully obtained." The conduct, actions, words and appearance of the defendant, as narrated by the various witnesses inevitably lead to that conclusion. In addition thereto, we have the unbiased opinion of Commissioner Turnage who saw the defendant just a few minutes after the police officers did, as well as that of Dr. Murphy who saw the defendant about an hour after the police officers

saw him, this being over three hours since defendant had had a drink of wine and *at a time when the mental faculties of the defendant should have been improved by such a lapse of time.* The testimony of those two witnesses was clear and unequivocal. In their opinion, the defendant was mentally incompetent.

Aside from the conclusions expressed by the police officers, which were not supported by the facts as narrated by them respecting the actions, the conduct and the words of the defendant before, at the time of, and immediately after, his confession, were certainly sufficient to establish, as a matter of law, that the defendant was mentally incompetent at the time he made the confession at No. 10 Precinct and thus bar the confession.

If there could have been any doubt in the mind of the trial Court upon the question of the incompetency of the defendant, at the time he made the confession at No. 10, the trial Court should have resolved the doubt in favor of the defendant and should have excluded the confession.

That is an established doctrine of the "judge-made" law, of which the Court speaks in *United States* v. *Mitchell,* 322 U. S. 65, 88 L. ed. 812, 64 S. Ct. 896. We find it in *Bram* v. *United States,* 168 U. S. 532, 565 (42 L. ed. 568, 18 S. Ct. 183):

> * * * In the case before us we find that an influence was exerted, and as *any doubt as to whether the confession was voluntary must be determined in favor of the accused,* we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record. (Italics supplied.)

That the defendant was not sufficiently in possession of his mental faculties at No. 10 Precinct, in order to make his confession admissible against him, is doubly proved

by the testimony of Inspector Barrett as to what occurred at the Jail in the latter's talk with the defendant. At the Precinct, Barrett was at liberty to question the defendant as long and as freely as he desired. Barrett's course of conduct was free and untrammelled. Yet, at the Precinct, Barrett could not get a clear statement and picture from the defendant as to what the defendant had done. That is unqualifiedly proved by Barrett's statement to the defendant at the Jail. At that time:

> Defendant was told that there were a few things witness (Barrett) wanted to straighten out (R. 25).

In the conversation at the Jail, no new matter was brought into the conversation other than that which had been discussed at the Precinct. No details of the crime other than what had been talked about at the Precinct were inquired about by Barrett. That demonstrates that Barrett actually knew that at the Precinct the defendant was not "coherent," notwithstanding Barrett testified that he was (R. 21).

That is another reason why the trial Court should have held, as a matter of law, that the confession of the defendant as made at No. 10 Precinct was inadmissible.

In *Ziang Sun Wan* v. *United States*, 53 App. D. C. 250, 256 (289 F. 908), the Court of Appeals of the District of Columbia held that the trial Court properly submitted to the jury the question of the admissibility of the defendant's confession, because "the evidence tending to show that it was involuntarily made was not so conclusive as to justify the court in excluding the confession from the jury." In that case the police officers denied the duress and intimidation of the defendant.

On Writ of Certiorari, the Supreme Court reversed (*Wan* v. *United States*, 266 U. S. 1, 16 (69 L. ed. 131, 45 S. Ct. 1), holding that notwithstanding the denials and avowals of

the arresting officers, duress was proved, as a matter of law, saying:

> The undisputed facts show that compulsion was applied. As to that matter there was no issue upon which the jury could properly have been required or permitted to pass.

Those words are equally as applicable in this case as they were in the *Wan* case. The facts, not the opinions of the police officers, impel the conclusion that the defendant was mentally incompetent at the time he was at No. 10 Precinct.

In *Perrygo* v. *United States,* 55 App. D. C. 80 (2 F. 2d 181), the trial Court submitted to the jury the question whether the verbal and written confessions of the defendant were freely and voluntarily made. The opinion in that case was reserved, pending the opinion of the Supreme Court in the *Wan* case.

In following the *Wan* case, the *Perrygo* case held that there was no controversial evidence to be submitted to the jury although the record in that case shows that the police officers steadfastly maintained that they had done nothing improper to induce the statement of Perrygo. The Court held (p. 83):

> * * * In the present case, after all the testimony concerning the confession had been introduced, the undisputed *facts* showed that the statements made by the defendant could not have been the result of purely *voluntary mental action.* (Italics supplied.)

In the *Perrygo* case, it appeared (p. 82) that Perrygo was "but 17 years old and of low mentality." In speaking of the relation of those circumstances to the admissibility of the confession, the Court said (p. 82):

> * * * We do not mean to intimate that he could not understand right from wrong, but we do mean that his

> *age and mentality are important factors* in determining whether, in the circumstances admittedly surrounding him, his confession was voluntary. (Italics supplied.)

In the case at bar, the defendant relied upon a concatenation of events, namely, the taking of the defendant to No. 10 Precinct for the express purpose of obtaining a confession from him, rather than immediately taking the defendant before a committing Magistrate for arraignment as required by statute, as well as the failure of defendant to have counsel at that time and *particularly*, when the defendant, according to all witnesses, was intoxicated.

We relied upon that proposition of law particularly because of the pronouncements in the majority opinion in *United States* v. *Mitchell, supra*, and in the concurring opinion of Mr. Justice Reed, wherein the latter states:

> As I understand McNabb v. United States, 318 U. S. 332, as explained by the Court's opinion of today, the McNabb rule is that where there has been illegal detention of a prisoner, *joined with other circumstances* which are deemed by the Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. Further, this refusal of admission is *required even though the detention plus the conduct do not together amount to duress or coercion.* • • •
>
> In my view *detention without commitment is only one factor* for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made without inducement or menace, it is admissible. If otherwise made, it is not, for if brought about by false promises or real threats, it has no weight as proof of guilt. Wan v. United States, 266 U. S. 1, 14; Wilson v. U. S., 613, 622; 3 Wigmore Evidence (1940 Ed.) Sec. 882. (Italics supplied.)

In the case at bar there is an accumulation of facts and circumstances which should entitle this defendant, in logic and in justice, to the shield and protection which the above cases have thrown about a defendant.

Moreover, the underlying principle of the law of the admissibility of confessions as evidence against an accused is tion as to whether or not the rights of the accused, under the trustworthiness of the confession, as well as the questhe Constitution, have been abridged. How can it be said that the confession of this defendant is reliable?

The Second Statement of the Defendant

The statement of the defendant given at the District Jail was also inadmissible. The defendant's statement at the Jail was part and parcel of the statement at the Precinct. Inspector Barrett, at the Jail, told the defendant that he wanted to "straighten out" a few things that defendant had told Barrett at the Precinct. The talk at the Jail was a supplement to the talk at the Precinct. The statement at the Jail was not intelligible without the talk at the Precinct. The things that had been wrongfully learned at the Precinct were made the basis of the talk at the Jail. If the things stated at the Precinct were inadmissible, they could not be admitted when made the basis of Barrett's interrogation at the Jail. The information which the Police had wrongfully obtained could not be used as the basis of obtaining additional information.

In the *Perrygo* case, *supra,* an oral confession was obtained as well as a written statement. The Court held that neither was admissible. In the *Wan* case, *supra,* it appears (266 U. S. 1, 9) that the defendant made four oral statements, the fifth being a stenographic report of an interrogation of the defendant. The Supreme Court held that none of the five statements were admissible (p. 15).

It follows, that if the statement of the defendant at the Precinct is inadmissible, the statement of the defendant at the Jail was inadmissible.

Conclusion

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all of the proceedings in the case numbered 8806 and entitled on its docket *Frederick C. Mergner* v. *United States*, and that the said judgment of the United States Court of Appeals for the District of Columbia, may be reversed, and for such other and further relief as to the Court may seem meet and proper.

FREDERICK C. MERGNER,
Petitioner,

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(7256)

INDEX

CITATIONS

640194—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1057

FREDERICK C. MERGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 81–84) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1945 (R. 85). The petition for a writ of certiorari was filed on March 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether inculpatory statements, made by petitioner while he was under the influence of alcohol, were properly admitted in evidence, when the statements were made to police officials who questioned him for about twenty minutes during the two-hour period that elapsed between petitioner's arrest and the time he was taken before the United States Commissioner.

STATUTE INVOLVED

Section 1 of the Act of August 18, 1894, c. 301, 28 Stat. 416, as amended (18 U. S. C. 595), provides:

> It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before

him, and no mileage shall be allowed any officer violating the provisions hereof.[1]

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia of the first degree murder of Charlotte Robinson, and was sentenced to death by electrocution (R. 4–5, 6–7, 8–9). On appeal, the judgment of the district court was affirmed (R. 85).

There was evidence from which the jury could have found the following facts: In April 1942, petitioner, a widower, employed Charlotte Robinson to care for his children (R. 24–28). He became friendly with her and expressed his intention of marrying her (R. 26, 28). In October 1943, Mrs. Robinson left petitioner's household to seek other employment (R. 28, 33.) Petitioner saw her occasionally thereafter and they quarreled about money matters (R. 24–25, 28, 33, 43).

[1] Petitioner refers to D. C. Code, Title 4, sec. 140, as controlling (Br. 19). But that provision applies only to arrests for offenses committed "in the presence of such member [of the police force], or within his view." That was not the situation here, and the Court of Appeals' ruling to the contrary in *Mitchell* v. *United States*, 138 F. 2d 426, reversed, 322 U. S. 65, is, of course, not binding on this Court. Cf. *District of Columbia* v. *Pace*, 320 U. S. 698; *Del Vecchio* v. *Bowers*, 296 U. S. 280. In any event, "whatever may be the minor variations of language, [these statutes simply] require that arresting officers shall with reasonable promptness bring arrested persons before a committing authority." *United States* v. *Mitchell*, 322 U. S. 65, 66.

On October 25, 1943, petitioner made an appointment to meet Mrs. Robinson. Although he did not normally carry a gun, he took one with him at that time. After petitioner met Mrs. Robinson, he drove with her to the vicinity of Fifth and A Streets, N. E., in Washington, D. C. They had an argument about money and petitioner shot her four times. He then attempted to throw her body down a manhole but was interrupted by a passerby; he drove away, leaving the body resting near a tree box. (R. 12–13, 14, 25, 26, 28–29.) The police were notified and they took Mrs. Robinson, who was still alive, to a hospital. She died shortly thereafter. (R. 13, 14–15.)

The two sergeants of the Metropolitan Police who arrested petitioner testified, in substance, as follows: About 2:00 p. m., on October 26, 1943, the day after the killing of Mrs. Robinson, they called at petitioner's home. Outside the house they saw an automobile with a bullet hole in the ventilator window, a lady's coat on the front seat, and blood stains on the cover of the front seat. The officers identified themselves to petitioner's father, who invited them in. Petitioner, who was in another room, asked if either of them was Inspector Barrett, and received a negative reply. Petitioner asked the officers to go to the sun-parlor of the house and then asked them what he could do for them. They inquired whether he knew Charlotte Robinson, and he replied that he did, that he was in love with her, and that "she was

a rat." One of the sergeants left the room. When he returned, he informed petitioner that he was under arrest and asked him where the gun was. Petitioner stated that the gun was in the car, and the sergeant again left the room. Petitioner stated that "I'm going to kill one of you sons of bitches or you are going to kill me before you leave here," but the police sergeant thought that petitioner was "just talking". Petitioner then pulled a gun from his hip pocket and the sergeant remaining in the room jumped on his back. The rug slipped and petitioner fell to the floor, where he and the sergeant tussled for the gun. The other sergeant came back and took the gun away from petitioner. The officers then took him to their car and started for No. 8 police precinct. En route they had a radio call directing them to take petitioner to No. 10 precinct. (R. 15–16, 18.)

Before their arrival at No. 10, petitioner became calm. In the course of the trip, petitioner stated to one of the officers, "You want to know all about who killed that girl, don't you," that "I can tell you, don't you think I can't. If you get me some whiskey, I will tell you about it; don't you think I can't." To this the officer replied, "Well, we'll talk about that later." (R. 19.) Upon their arrival at No. 10 precinct, the officers left petitioner with Inspector Barrett and Lieutenant Flaherty (R. 19).

At the time of his arrest petitioner was noticeably under the influence of alcohol, but there was no thickness of his tongue. He could be understood and he apparently understood what was said to him. (R. 16, 18–20.) During the time the officers were at his home petitioner drank a small glass of wine (R. 16, 18). On the way to the precinct, one of the officers talked to petitioner and petitioner gave responsive answers (R. 19). Petitioner staggered in going up the steps of No. 10 precinct, but when one of the sergeants attempted to straighten him, he ran up the steps, stating that he needed no assistance (R. 16, 19).

Following this testimony of the arresting officers, the Government called Inspector Barrett and Lieutenant Flaherty to testify as to statements made by petitioner to them after his arrest. A preliminary hearing was held out of the presence of the jury on the question of the admissibility of such testimony, and the trial judge ruled that it was admissible (R. 20–24). The testimony as to the statements and the circumstances under which they were made was then given before the jury (R. 24–31). The following facts were adduced: Inspector Barrett ordered that petitioner, whom he had previously known, be brought to No. 10 precinct for the purpose of talking with him (R. 21). Barrett talked with petitioner about ten minutes at approximately 3:00 p. m. Subsequently, Lieuteuant Flaherty came in and the three men talked for approximately eight minutes

more. (R. 20–21.) In the course of these interviews petitioner admitted that he had shot Mrs. Robinson and he related in detail the circumstances of the crime (R. 24–26, 27–29).[2] Petitioner was under the influence of liquor at the time of the interviews. He told the inspector he had been drinking since Friday, October 22, three days prior to the killing. He talked plainly at times and less so at other times. When he spoke of his children, he cried, but he was "nasty" when speaking of Mrs. Robinson. He understood questions put to him and his statements were coherent. (R. 20–22; see also R. 24–27.) When Lieutenant Flaherty came into the room, the inspector asked petitioner to repeat his account of the shooting to the lieutenant, and petitioner did so (R. 28). Flaherty testified that petitioner had obviously been drinking, but that he could not say that petitioner was drunk. Petitioner spoke of the time he had met Flaherty in 1939 and appeared to remember the incident clearly. Petitioner's answers were responsive to the questions put to him by the lieutenant and the inspector. (R. 22–23; see also R. 27–31.)

About 4:15 p. m. the same day—October 26, 1943—petitioner was taken before a United States Commissioner on the basis of a complaint made by one of the arresting sergeants. The Commis-

[2] The officers' account of petitioner's statements was developed before the jury after the judge had ruled that their testimony in this regard was admissible.

sioner did not permit petitioner to enter a plea for himself, but entered a plea of not guilty for him and committed him to the custody of the United States Marshal. The matter was then continued to November 2, but prior to that time an indictment had been returned against petitioner, with the result that no further hearing was held. The Commissioner testified that he entered the not guilty plea for petitioner because no witnesses were present and also because petitioner was "so emotionally disturbed" that the Commissioner thought he ought not to have been arraigned. (R. 23–24; see also R. 38–39.)[3]

[3] At the preliminary inquiry out of the presence of the jury, the Commissioner testified as follows concerning petitioner's condition (R. 23):

"* * * the defendant was so emotionally disturbed that he ought not to have been arraigned. Defendant was apparently in a condition where he had very little understanding of the gravity of the charge which had been placed against him. Defendant was not in any position to be arraigned at that time. Defendant seemed to have no understanding whatever of the predicament he was in. Defendant answered to his name, he made something of a scene, which I would call a scene, not too terrible a scene, and acted certainly abnormally, to say the least. Defendant was talking, his conversation was absolutely unintelligible. Witness could not remember what defendant said. Defendant was talking in a loud voice and also mumbling to himself. Witness could understand some of it but could not remember it. Defendant answered his name, said, 'This is getting serious,' then started to go all to pieces; he was pretty nervous.* * *"

When called as a defense witness before the jury, the Commissioner testified (R. 38–39):

"* * * The complaint was read to defendant, he answered to his name, and witness entered a plea of not guilty

On October 28, 1943, two days after petitioner's arrest, Inspector Barrett and Lieutenant Flaherty again talked with him at the District Jail.[4] Petitioner was completely sober at that time.

The inspector told petitioner that there were a few things he "wanted to straighten out" (R. 25). Petitioner corrected his prior statement to these officers as to the place of the shooting, and said that it occurred at 5th and A rather than 4th and A Streets, N. E. (R. 25, 29). It was at this time that petitioner told the officers that, although he did not usually carry a gun, he had taken one with him on the night he met Mrs. Robinson (R. 25). When the officers asked him to explain why he

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because defendant did not seem to be in a condition where he could rightfully understand the predicament or seriousness of the offense with which he was charged; witness only remembers defendant saying: 'This thing is getting serious'; that witness did not smell any liquor on defendant, he was not close to him. Defendant did not stagger. Defendant's tone of voice was very high; witness could understand what defendant said sometimes and at other times he could not. Defendant was sort of mumbling. It was very hard for witness to determine just exactly the defendant's condition. Defendant's condition was such that witness ought not to have permitted defendant to enter a plea in any type of case. On cross-examination, witness testified that at the arraignment, defendant responded to his name and that he was the man charged. * * *" (See also the testimony of a deputy marshal, the deputy coroner, and the chief clerk of the District Jail, each of whom was called as a defense witness, concerning petitioner's condition later in the afternoon of October 26, R. 37, 39–40, 41.)

[4] The facts as to this second interview were not developed at the preliminary hearing, but were brought out when the trial was resumed before the jury.

had shot Mrs. Robinson, petitioner said "he didn't want to discuss it any further, that he had told them all about it at No. 10," that he had "gone over the whole thing at No. 10 and there was nothing additional to add" (R. 30).

In his charge to the jury the trial judge instructed them in respect of petitioner's statements to the police (R. 75):

> It is argued in behalf of the defendant that when those statements were made he was still in a drunken condition and that by reason thereof those statements were mere vapid ramblings of a drunken man, they did not represent truth and fact. He was not relating what occurred, that is his position.
>
> On the other hand, the Government contends that although he was drinking he nevertheless did remember what had occurred, stated the substantial truth to the officers on the several occasions mentioned, and that his statements did in their essence represent the truth of this unfortunate affair. But that is a question for you to decide. It is for you to determine whether or not he was in a state of drunkenness and, if so, whether or not it was so pronounced that he did not remember and that what he said did not represent fact and truth. If you believe that to be so, then of course you will give no credence to his statement, it would have no weight (his statements would have no weight); but on the other hand, if you believe that his statements

were the product of memory and truth, then of course you would give them weight, you would accept them, you would fit them into the whole pattern of fact, of evidence I should say, and in the light of the whole picture give those statements such weight as you believe them entitled to.

ARGUMENT

Petitioner contends (Pet. 15–16, Br. 18–34) that the trial judge committed reversible error in permitting Inspector Barrett and Lieutenant Flaherty to testify as to the inculpatory statements made by petitioner to them after his arrest. He does not argue that the fact that his inculpatory statements were made while he was under the influence of alcohol necessarily rendered them untrustworthy as evidence. Indeed, it is well established that the mere fact of intoxication does not render a confession inadmissible, but is, rather, a factor to be considered by the jury in determining its weight and credibility. *Bell* v. *United States,* 47 F. 2d 438 (App. D. C.); see cases collected at 74 A. L. R. 1102, 50 L. R. A. (N. S.) 1077, 18 L. R. A. (N. S.) 789. In the instant case, the evidence fairly establishes that petitioner, although under the influence of alcohol, was in sufficient possession of his faculties to be able to give a trustworthy account of his actions. He himself testified that during the morning of the day of the confession, he called Inspector Barrett to give him "some information," and left

his telephone number with the person who answered at the police department (R. 48, 52). Petitioner talked rationally with the arresting officers and was cunning enough to tell them that his gun was in his car, although he had it in his pocket at the time. He was able to give a coherent account of the shooting to Inspector Barrett and Lieutenant Flaherty, and his answers to their questions were responsive. His account of the shooting harmonized with the facts established by independent evidence (cf. R. 24–25 with R. 11–13, 15, 32, 38). Two days later, when he was admittedly sober, he apparently recollected the statements he had made to these officers, for he said on that occasion that he had told them "all about" the "whole thing" in his prior statements made at No. 10 precinct (R. 30).

The trial judge correctly and clearly charged the jury that it was to determine whether the petitioner's statements were the "mere vapid ramblings of a drunken man" or whether they did "represent the truth of this unfortunate affair" (R. 75). Under the circumstances, as the court below held (R. 82), the statements were properly presented to the jury under appropriate instructions.

Petitioner's principal argument is that his statements should have been excluded under the doctrine of *McNabb* v. *United States,* 318 U. S. 332. We think that there was no unlawful conduct on the part of the metropolitan police officers

which would justify the exclusion of petitioner's statements on such ground. There was here no violation of the rule of the *McNabb* case excluding confessions secured during a period of "inexcusable detention for the purpose of illegally extracting evidence from an accused," and no "successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure." See *United States* v. *Mitchell,* 322 U. S. 65, 67.

Petitioner was brought before a committing magistrate a little more than two hours after he was arrested. During that period he was questioned for less than twenty minutes, and he answered the officers' questions voluntarily without fear of threats or inducement of reward. Petitioner attempts to spell out a violation of the *McNabb* rule in the fact that he was taken to No. 10 precinct for questioning, without the opportunity to consult counsel, instead of being immediately arraigned (Br. 19–20). But his argument in this respect is specious. Here, as in the *Mitchell* case, there was a "prompt acknowledgement by an accused of his guilt", and the confession was "not elicited through illegality" (322 U. S. at 70). The absence of counsel is no more relevant here than it was in the *Mitchell* case.

Neither, we submit, does petitioner's voluntarily induced intoxication render illegal conduct by police officers which otherwise bears no taint

of illegality. As we have shown, *supra,* pp. 11–12, it is evident that petitioner was well able to understand what he was saying, and it is clear that the officers took no advantage of his condition to extort admissions from him.[5]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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[5] Since petitioner's statements at the first interview were properly admitted in evidence, there can, of course, be no question as to the admissibility of his statements made in the second interview at the District Jail, after he had been brought before a committing magistrate and at a time when he was admittedly sober. Moreover, irrespective of the validity of the first statement, we believe that the second was admissible under the principle of *Lyons* v. *Oklahoma,* 322 U. S. 596.

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